STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LANCE THOMAS DEWEESE,

Defendant-Appellant.

UNPUBLISHED
October 26, 2004

No. 251514
Roscommon Circuit Court
LC No. 02-004367-FH

Before: Murphy, P.J., and Sawyer and Markey, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of possession of marijuana (second offense). MCL 333.7403(2)(d); MCL 333.7413(2). He was sentenced as a habitual felony offender to 18 months to 4 years in prison. He now appeals and we affirm his conviction, but remand for resentencing.

Police, acting on information supplied by defendant's girlfriend's stepson, obtained a search warrant for defendant's residence. The search yielded marijuana, the basis for defendant's conviction.

On appeal, defendant challenges the validity of the search warrant and argues that the trial court erred in denying his motion to suppress the evidence. We disagree. The standard of review applicable to a suppression ruling varies with which aspect of the ruling is at issue. We review a trial court's decision regarding a motion to suppress evidence for clear error. *People v Sobczak-Obetts*, 463 Mich 687, 694; 625 NW2d 764 (2001). Questions of law relevant to the suppression issue, however, are reviewed de novo. *Id.* Finally, trial court's findings of fact made at the suppression hearing will only be reversed if clearly erroneous. *People v Oliver*, 464 Mich 184, 191; 627 NW2d 297 (2001).

Defendant first argues that the warrant was defective because the affidavit failed to establish either the credibility of the informant or the credibility of the information. Defendant argues that the affidavit was deficient under both state and federal law. We disagree. Under Michigan law, a magistrate may issue a search warrant based upon information supplied by an informant if the requirements of MCL 780.653 are met. If the informant is named in the affidavit, all that is required by the statute is that the informant spoke with personal knowledge. MCL 780.653(a). If the informant is unnamed, in addition to showing that the informant spoke with personal knowledge, it must be shown that the unnamed person is credible or that the

information is reliable. MCL 780.653(b). Here, the informant was named, so the warrant is valid under the statute so long as the informant spoke with personal knowledge.

Defendant's reliance on *People v Sherbine*, 421 Mich 502; 364 NW2d 658 (1984), for the proposition that the statute requires a finding of credibility of the informant is misplaced as *Sherbine* was decided under a previous version of the statute. See *People v Collins*, 438 Mich 8, 13 n 7; 475 NW2d 684 (1991). The prosecutor in this case correctly points out that the current version of the statute imposes no such requirement where the informant is named in the affidavit. Therefore, the affidavit in the case at bar satisfies the statutory requirements.

But, contrary to the prosecutor's suggestion, our analysis does not end with the statute. While the Legislature may not statutorily impose a requirement of showing credibility were the source is named, both the Michigan and federal constitutions do. In *People v Levine*, 461 Mich 172, 178-177; 600 NW2d 622 (1999), the Michigan Supreme Court concluded that the Michigan Constitution was to be construed in a similar manner as the federal constitution, which requires the application of the "totality of the circumstances" analysis set out in *Illinois v Gates*, 462 US 213; 103 S Ct 2317; 76 L Ed 2d 527 (1983). The *Gates* test abandoned the more rigorous *Aguilar-Spinelli* test, which required a showing of the credibility of both the informant and the information, as well as the basis for the informant's knowledge. *Levine, supra* at 179. *Gates* recognizes that not every case presents a situation in which all of the requirements of the *Aguilar-Spinelli* test can be met, yet when the evidence is viewed in the totality of the circumstances, there is a sufficient basis to conclude that probable cause exists to believe that the evidence may be found in the place to be searched.

In the case at bar, the affidavit does not present much in the way of corroboration of the informant's credibility. For example, there is no indication from the affidavit that he had previously supplied information to the police that proved reliable. But, it is favorable that the informant was named, rather than anonymous, and that he was closely familiar with the suspects (being his stepmother and her boyfriend). In looking to the credibility of the information supplied, it is favorable that the informant spoke with personal knowledge, relating what he had personally observed, thus indicating it was more "than a casual rumor or information based on an offhand remark heard at a neighborhood bar." *Levine, supra* at 184. The informant also provided information regarding his stepmother's involvement in drug dealing which was consistent with information that had been previously supplied by an unnamed source. The informant was also able to direct the police to defendant's residence, and the police were able to confirm through official records that that was defendant's residence.

In sum, while this case perhaps presents a close call, we are not persuaded that the trial court clearly erred in deciding that, in the totality of the circumstances, there was sufficient reliability to establish probable cause.

Defendant also argues that the search warrant was defective because it was overly broad. We disagree. Defendant first argues under this point that there was no probable cause to believe that any drugs would be found in the residence. That argument is patently wrong. The affidavit states that the informant had personally observed marijuana seeds being germinated in the residence two weeks previously. The affidavit further states that the informant was familiar with marijuana, marijuana seeds and the process of growing marijuana, including the fact that it takes ten to fourteen days for seeds to germinate. The affiant further stated that he was familiar, based

upon training and experience, that marijuana cultivation was a lengthy process taking months to complete. Accordingly, based upon the information supplied in the affidavit, it was reasonable that marijuana, in the form of seeds, germinating seeds or growing plants, would be found in the residence.

Defendant further complains that the warrant failed to specify which locations within the residence could be searched and was overly broad by permitting the search of the residence as a whole. Defendant argues that the warrant should have been restricted to a search of the kitchen only because that is where the informant observed the marijuana seeds being germinated. We are unaware of any case, nor does defendant point us to any such case, that has held that a search warrant must be more specific than identifying the residence to be searched. Therefore, we reject defendant's argument that the warrant needed to be more narrow than the residence as a whole.

Defendant also argues that the warrant was not sufficiently specific in regards to the items to be searched for. The warrant authorized the officers to search for and seize the following items:

> (A) Any and all controlled substances, specifically but not limited to Marihuana.
>
> (B) Any and all records pertaining to trafficking in controlled substances.
>
> (C) Records pertaining to proof of residency.
>
> (D) Any and all equipment/supplies used in the cultivation/manufacture of marijuana.

The only items, however, that defendant claims were seized that should have been suppressed were marijuana and marijuana seeds. Even accepting defendant's argument that the warrant authorized a broader search than it should have based upon the probable cause that existed,[1] at a minimum the warrant did specifically authorize the seizure of marijuana, which, as discussed above, was supported by probable cause. Therefore, any overbreadth in the warrant went to items that defendant does not argue were seized and should have been excluded from evidence. We do not believe that it is an appropriate use of the exclusionary rule to suppress evidence that is specifically and properly named in a search warrant merely because it was hypothetically

[1] We are not suggesting that this is the case. Cf. *Groh v Ramirez*, 540 US 551; 124 S Ct 1284; 157 L Ed 2d 1068 (2004). In *Groh*, the Court not only accepted the mere listing of an address for the place to be searched, but also indicated approval of language in the warrant application listing the items to be seized as "any automatic firearms or parts to automatic weapons, destructive devices to include but not limited to . . . and any and all receipts pertaining to the purchase or manufacture of . . . ." *Id.;* 124 S Ct at 1288. The warrant, however, was found to be defective because that description was only in the application, not the warrant itself.

possible for the police to have seized some other item that would have come within an improperly broad grant of authority in the search warrant.

For the above reasons, we conclude that the trial court did not err in denying defendant's motion to suppress evidence seized under the authority of the search warrant.

Defendant additionally raises a number of issues related to sentencing in a brief filed in propria persona. Defendant was convicted of possession of marijuana, MCL 333.7403(2)(d), which carries a maximum sentence of one year in jail. This was enhanced under the provisions of MCL 333.7413(2), which provides for a doubling of the possible penalty for a repeat drug offender. It was enhanced again under the general habitual offender statute, MCL 769.12, doubling the penalty a second time, with the trial court imposing a maximum sentence of four years. But this Court held in *People v Fetterley*, 229 Mich App 511; 583 NW2d 199 (1998), that such double enhancement is improper. Once a sentence is enhanced under the Public Health Code, it cannot be enhanced again under the general habitual offender provisions. *Id.* at 540-541. Accordingly, defendant is entitled to be resentenced by the trial court, with the maximum sentence being two years, as provided for under the enhancement provisions of the Public Health Code.

In light of our resolution of this issue, we need not address the other sentencing issues raised by defendant.

Defendant's conviction is affirmed, but the matter is remanded to the trial court for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Jane E. Markey